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No. 06-188

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In The

Supreme Court of the United States

RACHAEL NELSON
N/K/A RACHAEL MARSH,

Petitioner,

v.

BLAIN NELSON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Kansas

BRIEF OF RESPONDENT IN OPPOSITION

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JURISDICTION

The Petitioner, Rachael (Nelson) Marsh has improperly attempted to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). As revealed under "**OPINIONS BELOW**" on page 1 of the Petition for Writ of Certiorari, there was no decision of a Federal Court of Appeals involved.

CONSTITUTIONAL PROVISION INVOLVED

This case does not involve the Fourteenth Amendment to the United States Constitution, nor, does it involve any other provision of the United States Constitution. It involves only non-constitutional findings of fact by a State Court.

STATEMENT OF THE CASE

The divorce between Rachael (Nelson) now Marsh and Blain Nelson was precipitated by an extramarital relationship that she had developed with Doug Marsh. What would otherwise be unremarkable is rendered significant by several things. Most importantly, in the mid 1980's, Doug Marsh was accused of sexually molesting a young boy while present in his mother's home where she ran a daycare business. Doug was confirmed to be a sexual abuser by the Kansas Department of Social and Rehabilitation Services (SRS) and was reported to the State's Central Registry. Further evidence indicated that Doug is low functioning intellectually, unemployable and a recovering alcoholic with at least one DUI conviction.

Both Rachael and Blain had also been confirmed by SRS as having emotionally abused the children. SRS scrutiny was heightened by Doug's presence in Rachael's life. Rachael herself, ran a daycare business in her home for a period of time. Doug was forbidden from being in the home. In addition, the County Health Department which supervised Rachael's daycare license had documented several health and safety concerns. Rachael's relationship with Doug had prompted SRS to consider taking action. In fact, as of the time Rachael and Blain were divorced, SRS had already spoken with the Norton County Attorney about the situation.

On December 29, 2003, an order was entered in the pending divorce action forbidding Doug Marsh from being around Rachael's and Blaine's children. The following March, Rachael agreed to temporary custody orders which placed the children in third party custody with Melissa McMullen (Intervenor), their paternal aunt. That arrangement was confirmed as a part of a permanent parenting plan agreed to by the parties and adopted by the Court on May 10, 2004. Before the agreement was approved, both parties were examined under oath by their attorneys. In addition, the Trial Judge questioned Rachael in-depth concerning her understanding of the agreement and the consequences thereof.

Shortly thereafter, Rachael Nelson married Doug Marsh and moved to change custody, claiming that the parental preference doctrine required the Trial Court to restore custody of the two minor children to her. Rachael claimed that she should be relieved of her waiver of the parental preference doctrine because she was under duress when she signed the agreement. She claimed that she did so only because she had been told by the Intervenor, and

her own attorney that if she did not do so, SRS would take the children from her. More specifically, Rachael recounted a visit from the Intervenor and the Intervenor's mother when she was told that if she didn't place the children with the aunt, SRS would file a child in need care case and take the children and place them in foster care with strangers. Although that was Rachael's initial testimony, on cross-examination she admitted that the Intervenor had come to her house out of concern for the fact that the kids might be split up and sent off to foster care if Rachael didn't do something else.

The parenting plan which was signed by both parties and their attorneys recited that:

> "SRS has begun an investigation into each parent and to avoid any further issues, the parties are agreeing to custody with Melissa McMullen until the Court finds a material change in circumstances warranting a change thereto."

Dorothy Lewis of SRS testified in substance that her agency was in a "wait and see" mode. Ultimately determining that when the children went to the Intervenor, there was no reason to proceed further on the Doug Marsh concern.

At a proceeding on January 11, 2005, the Trial Court made a factual determination that Rachael Marsh was not under duress when she signed the agreement waiving her parental preference doctrine and placing custody of her minor children with the Intervenor.

After hearing on the merits of the motion to change custody which occurred the following month, the Trial Court again concluded that there was a basis for Rachael's concerns that SRS might remove her children because of

substantiated abuse and Rachael's relationship with Doug Marsh. The Court said:

> "Ms. Marsh was aware of her rights and was aware of what she was doing and after being made aware of her rights, having been given knowledge of the, of what she was doing, understanding her position and her actions, then of her volition, voluntarily and knowingly and intelligently allowed for custody and residency of her children to be vested in her sister-in-law, Melissa McMullen. Once again, that is also as a result of the agreement, which agreement she entered into with her husband, now former husband, in the form of a parenting plan."

The Court ultimately denied Rachael's motion to change custody finding that there had been no material change of circumstances. Rachael appealed that decision to the Kansas Court of Appeals. On appeal, she raised for the first time, an assertion that it is contrary to public policy and a violation of a child's Fourteenth Amendment rights to allow for a parent's waiver of the parental preference doctrine without notice and consent of the minor child. The Court of Appeals noted the impropriety of raising that argument for the first time on appeal. Nevertheless, in an attempt to lay the issue to rest, the Court considered the merits of the argument and found that there were none.

From the adverse decision of the Kansas Court of Appeals, Rachael petitioned the Kansas Supreme Court for review. The petition was denied.

REASON FOR DENYING REVIEW

The duress issue:

28 U.S.C. § 1257(a) allows review by the United States Supreme Court of State Court decisions where a right or privilege is specially set up or claimed under the Constitution of the United States. Review of this case should be denied because no constitutional issue is presented. The petition for review is a thinly veiled and disingenuous attempt to convince the United States Supreme Court that it should review conflicting evidence on a factual determination made in a State Trial Court. The Kansas Court of Appeals refused to do so. This Honorable Court should do so as well.

The Petitioner does not actually claim a violation of her Fourteenth Amendment right to raise her children. Her argument is that the Trial Court and thus, the Court of Appeals incorrectly ruled on a factual issue whether she had validly waived that constitutional right. It is true that rights of a parent to the care, custody and control of his or her children are fundamental rights protected by the due process clause of the Fourteenth Amendment. ***Troxel v. Granville***, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S.Ct. 2054 (2000). Kansas adheres to that rule. ***In re Guardianship of Williams***, 254 Kan. App. 14, 869 P.2d 661 (1994). Rachael's first problem is that, even if she were correct, she is not automatically entitled to custody. Under K.S.A. 2004 Supp. 60-1610(a)(3)(B) "Neither parent is considered to have a vested interest in the custody or residency of a child as against the other parent. Blain supports the District Court's ruling and prefers that custody remain with Melissa.

Furthermore, a parent may waive the parental preference doctrine, "It is beyond argument that 'All constitutional rights may be freely and voluntarily waived.'" ***In re Habeas Corpus Application of Tolle***, 18 Kan. App. 2d 491, 496, 856 P.2d 944 (1993).

Rachel does not contest that she waived the parental preference doctrine. Instead, she claims that she did so under duress. Undue influence or duress is a species of fraud which must be shown by clear, satisfactory and convincing evidence. ***Heck v. Archer***, 23 Kan. App. 2d 57, 927 P.2d 495 (1996). The Trial Court found that the weight of credible evidence balanced against Rachael. This was a factual determination. It was incumbent upon the Kansas Court of Appeals only to determine whether there was substantial competent evidence to support the District Court's ruling. ***State v. Donesay***, 265 Kan. 60, 959 P.2d 862 (1998). The Court of Appeals did so and found that there was indeed substantial competent evidence to support the finding that Rachael knowingly and voluntarily waived the parental preference rule.

Even if duress of some species existed, a threat of valid legal action is not duress within the meaning of the law. ***Browning v. Blaire***, 169 Kan. 139, 218 P.2d 233 (1950). ***U.S. Banking Co. v. Veale***, 84 Kan. 385, 114 P.2d 229 (1911).

Whatever pressure Rachael Nelson felt to waive the parental preference doctrine was self-induced. She must have known that there was some validity to the perceived threat that her children might be placed in foster care. She knew that she and Blaine had been both substantiated for earlier emotional abuse to the children. She also knew of SRS concerns about Doug Marsh. Additionally, she had

been cautioned by the County Health Department and reprimanded for leaving Doug Marsh alone with the children in her daycare. Indeed, SRS was maintaining a "wait and see" posture regarding the outcome of the divorce litigation. The obvious implication was that if custody was not resolved in the fashion that it was, other options would be considered.

The guardian ad litem issue:

Rachael's contention that public policy and the Fourteenth Amendment prohibit allowing a parent to waive the parental preference doctrine without the notice and consent of the minor child is frivolous. First of all, having failed to raise the issue before the Trial Court, this error, if any, was invited by Rachael. A party may not invite error and then complain on appeal. ***Butler County R.W.D. No. 8 v. Yates***, 275 Kan. 291, 64 P.3d 357 (2003). Rachael's argument centers on the failure of the Court to appoint a guardian ad litem for her children. There is no case law or statutory mandate which compels the appointment of a guardian ad litem under these circumstances. The parental preference doctrine creates a *prima facie* presumption that a parent has a constitutional right to raise his or her child. The right does not belong to the child. This case is not an adoption or a proceeding brought to otherwise terminate parental rights. It is a proceeding to determine with whom the children should live based upon their best interests as a consequence of a valid waiver of the parental preference rule.

CONCLUSION

Review of these findings by the United States Supreme Court is not warranted. No constitutional issues are presented. The Petitioner is attempting to secure ruling of an adverse factual determination in State Court. That does not provide a valid basis for review under 28 U.S.C. § 1257.

Respectfully submitted,

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